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TRUSTS AND ESTATES UPDATE

Expert Analysis

First Impression Cases, Unique Issues Dominate First Quarter

The first quarter of 2009 opened with opinions from the Appellate, Supreme and Surrogates' Courts that addressed cases of first impression and/or rarely before seen issues affecting the field of trusts and estates. From biotechnology to costs for outgoing counsel and matters impacting the probate of wills, the year 2009 portends to be anything but dull.

By **Ilene Sherwyn Cooper**

Cryopreserved Specimens

In March 2009, the Appellate Division, First Department, was presented with a unique issue addressed to the legal rights, if any, of a decedent's estate to cryopreserved reproductive tissue.

In *Speranza v. Repro Lab Inc.*, appeal was taken from an order and judgment of the Supreme Court, New York County (Solomon, J.), which denied plaintiffs' motion for a preliminary injunction and declared they had no legal right to certain specimens.

Plaintiffs were the administrators of their late son's estate. Prior to his death, the decedent deposited a number of semen specimens in the facility of the defendant, which specimens were frozen and stored in the defendant's vaults. Although no reason appeared in the records of the defendant regarding the decedent's reasons for depositing the specimens, the parties acknowledged that the decedent was about to undergo treatment for an illness, and was concerned about being able to conceive a child thereafter. At the time the specimens were taken, the decedent completed a form with the lab that directed that in the event of his death the specimens were to be destroyed. Six months later, plaintiffs' son passed away.

Subsequent to the decedent's death, plaintiffs, as administrators of their son's estate, contacted the lab and were informed that the specimens remained in storage, but were not available for public use, inasmuch as they had not been screened as required for donation. However, the lab agreed to retain the specimens until plaintiffs could determine their legal options, provided they continue to pay the annual storage fee. Plaintiffs continued to pay the fee, and in the interim located a surrogate mother for artificial insemination with their son's sperm. Plaintiffs requested release of the sperm from the lab, and were then informed by the lab that it was required to destroy the specimens, pursuant to their son's instructions. Nevertheless, the lab continued to retain the sperm.

Plaintiffs then commenced suit for possession of the specimens, claiming, in part, that the lab had breached its contract with the decedent when it continued to retain his specimens posthumously. In addition, plaintiffs moved for a preliminary injunction ordering the defendant to preserve the specimens pending the outcome of the litigation. The Supreme Court denied plaintiffs' motion for injunctive relief, and, sua sponte, dismissed the action, holding, inter alia, that since the decedent's samples had not been tested for disease as required for donors of reproductive tissue, it would be a violation of law and public policy to allow the sperm to be released to plaintiffs for their use.

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The Appellate Division affirmed, finding that substantial grounds based in public policy precluded giving plaintiffs possession of the specimens for purposes of perpetuating the decedent's biological child. More specifically, the court opined that the operative regulations of the New York State Department of Health, as they applied to "donors" rather than "client-depositors," require screening and testing of the specimens before they can be utilized for insemination of a surrogate, who is not a regular sexual partner of the donor. In addition, the court noted that the regulations have very specific provisions for the manner in which reproductive specimens are to be treated by the tissue bank, and require the informed consent of the donor, including the right to withdraw consent, to donation of the tissue. In view of these provisions, the court held that the defendant's conduct relative to plaintiffs' request was proper and in accordance with law.

The court rejected plaintiffs' argument that the contract between the defendant and the decedent could be reformed or terminated in order to allow them to use the specimens for the purpose intended. To this extent, the court found significant the language in the contract, which the decedent acceded to, that directed that the specimens he provided be destroyed upon his death. The court, thus, concluded that while the decedent had a desire to store and utilize his specimens should he survive and be unable to procreate, he had no intent that they be used posthumously.

Further, the court found without merit plaintiffs' claims that they were entitled to the specimens due to the defendant's breach of contract in holding onto them and collecting the annual storage fee. The court held that whatever the remedies in contract attributable to this breach, plaintiffs had no possessory right to the specimens as assets of the decedent's estate.

Based upon the foregoing, the court concluded that plaintiffs failed to show a likelihood of success on the underlying claim against the defendant, and moreover, that they were entitled to the ultimate relief sought in the action.

***Speranza v. Repro Lab Inc.*, __NYS2d__ 2009, 2009 N.Y.Slip Op. 01543 (1st Dept. 2009)**

Probate Decree Vacated

While vacatur of a probate decree is not a common occurrence in the Surrogate's Court, it is less common several months after probate of a previously unchallenged will. Nevertheless, in *In re Balukopf*, the Surrogate's Court, Nassau County, vacated a probate decree issued four months earlier, finding that while the movant had failed to establish a sufficient basis for doing so, the "unique" circumstances presented in the record nevertheless required this result.

The record revealed that the decedent died, a widow and without any children, in June 2007. Her live-in caretaker filed a petition for the probate of her will, in which she was named the sole beneficiary and fiduciary. In response to the court's request for an affidavit of family tree, the petitioner stated that she was not aware that there was any person who could prepare such information, but for two contacts the decedent had made during her lifetime, which she stated she did not believe were relatives.

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Thereafter, various relatives of the decedent communicated with the court and indicated that the decedent had a prior will that left her estate to her relatives and relatives of her late husband. Although they stated that they could not locate a copy of this instrument, they stated that they intended to object to the propounded instrument. The letter to the court also stated that the petitioner had committed perjury in the petition for probate inasmuch as she knew at the time it was filed that the decedent had six distributees, but nevertheless stated that she had none.

In response to the letter, the petitioner amended her petition to list the decedent's distributees. In addition, the amended petition stated that no beneficiary under the propounded will had a confidential relationship with the decedent. Thereafter, three of the decedent's distributees appeared by counsel. The petition was amended once again, and the six distributees of the decedent were listed. Notice of the filing of this second amended petition was not provided to counsel who appeared for the distributees. Thereafter, a decree with notice of settlement was served upon counsel for the distributees. No objections to the decree were filed, and the propounded will was admitted to probate.

Soon thereafter, the distributees moved to vacate the decree and to file objections to probate. Upon consideration of the record, the court found that while the circumstances might have been sufficient to establish an excusable default by the movants in seeking to file late objections, the fact remained that counsel delayed four months before taking any action on behalf of his clients to object to probate. Moreover, the court held that even if an excusable default had been established, the movants failed to establish a reasonable probability of success on the merits.

Nevertheless, despite the deficiency of the movants' arguments, the court expressed concern with the underlying circumstances of the matter, including but not limited to the material misstatements of fact in the initial petition filed with the court pertaining to the existence of the decedent's distributees, the failure of the petitioner to disclose in her second and third amended petition that she was the decedent's live-in companion, and thus potentially stood in a confidential relationship with her, the fact that the propounded will was a radical departure from the decedent's prior will, and the fact that the propounded will had been inexplicably prepared and its execution supervised by an attorney who had not prepared and supervised the execution of the decedent's prior will.

Based upon the foregoing, the court held that it was no longer satisfied with the genuineness of the propounded will, and vacated the decree admitting the instrument to probate.

***In re Balukopf*, New York Law Journal, April 9, 2009, p. 28 (Sur. Ct. Nassau County) (Sur. Riordan)**

Copying Expenses

While disbursements of counsel, and in particular, the costs of photocopying, have always been subject to court supervision, the issue of whether a retaining lien may be asserted with respect to the disbursements incurred by outgoing counsel for reproducing their former client's file has rarely been the subject of judicial opinion. In *Moore v. Ackerman*, the court had the opportunity to address this question, and found that, under the circumstances, counsel was entitled to reimbursement for these expenses.

In reaching this result, the court principally relied upon the holding of the Court of Appeals in *Matter of Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 NY2d 30 (1997), and held that the implications of the decision would allow a client to be billed costs that are not advanced during and in furtherance of the representation, as well as costs incurred upon termination of counsel's representation. The court found further support for its conclusion in the Disciplinary Rules which require a lawyer to retain certain documents in the client's file, including but not limited to bookkeeping records, and copies of all retainers and compensation agreements, and prohibit a lawyer from delivering documents to a client in satisfaction of this obligation. In addition, the court noted that the Second Department requires, with respect to certain specified claims or actions, including those for personal injury, property damage or wrongful death, that the attorney preserve for a period of seven years virtually the entire file.

Based upon the foregoing, the court concluded that upon the termination of representation, under circumstances where the lawyer has not been discharged for cause, or has improperly withdrawn, the lawyer may fairly charge the client for the reasonable costs of complying with the client's request for the file. Moreover, the court opined that when the file includes material that the lawyer is required by ethical or other court rule to maintain, a reasonable cost for copying the files for the lawyer's records would not be inappropriate.

Within this context, the court held that because outgoing counsel in the pending case had been retained in an action for personal injury, he was required to retain virtually his entire file for a period of seven years, and therefore, could charge the cost of copying the file to his client. However, the court directed that a hearing be held with respect to the reasonableness of these charges, unless former and incoming counsel could resolve the question beforehand.

***Moore v. Ackerman*, NYLJ, March 19, 2009, p. 25 (Sup. Ct. Kings County)**

Same-Sex Partner

The rights of same-sex couples have been an ever-evolving legal issue confronted by New York courts. Pending legislative consideration of the right of same-sex couples to marry, New York courts have been considering such issues as the rights of same-sex couples to inherit as distributees, to share in death benefits, and to participate in health benefits.

Recently, the New York County Surrogate's Court in *Matter of Sebastian (Glen S.)* had the opportunity to pass upon the novel question of whether the petitioner, the genetic parent of the child and legally married to her same-sex partner, who was the child's gestational mother, could adopt the child. The record revealed that the petitioner and her partner were involved in a long-term relationship before they married in 2004 in the Netherlands. Thereafter, as a result of in vitro fertilization, utilizing the petitioner's ova and a donor's sperm, the petitioner's partner gave birth to a child. The birth certificate for the newborn, issued by New York City's Department of Health, reflected the petitioner's partner as the child's parent. Accordingly, and notwithstanding her marital relationship to the child's gestational parent, and her genetic relationship to the child, the petitioner sought to adopt the child.

In authorizing the adoption, the court indicated that there was no reported decision in New York, or other states, that had discussed or determined the parentage of a child's gestational and genetic mothers in a proceeding which involves no dispute between the parties. Hence, in its analysis, the court examined the law with respect to recognition of foreign marriages, finding that while New York will recognize same-sex marriages validly contracted in sister states, other states in the country will not necessarily accord the same treatment to such relationships, if the marriage violates the forum's public policy. To this extent, the court noted that currently there are explicit prohibitions against same-sex marriages in 44 states, and hence, the possibility that these states will deny recognition of same-sex marriages validly contracted elsewhere, as well as the legal rights, including parenthood, flowing from these marriages. As a consequence, the court found that absent some other means of establishing the child's parentage, adoption was the only means of establishing the parent/child relationship between the petitioner and the child, and protecting the rights and obligations incident thereto.

The New York County Surrogate's Court in 'Matter of Sebastian (Glen S.)' had the opportunity to pass upon the novel question of whether the petitioner, the genetic parent of the child and legally married to her same-sex partner, who was the child's gestational mother, could adopt the child.

Further, relying upon Chief Judge Judith S. Kaye's opinion in *Matter of Jacobs*, 86 NY2d 651, 667 (1995) , as well as the provisions of the Uniform Parentage Act §§106, 201, the court found that while no New York statute had dealt directly with the issue of whether the law should recognize both parties in a committed lesbian relationship, one of whom is the gestational mother, and the other of whom is the genetic mother of the child, the purpose of serving children's best interests by providing them with two responsible parents, rather than one, requires that paternity proceedings and acknowledgment of paternity be made available to lesbian genetic co-mothers.

Finally, the court concluded that while a gender neutral acknowledgment of paternity was an important protection to afford a child born of a same-sex couple, it would not necessarily insure that courts of other states would grant full faith and credit to an order of filiation issued to a genetic mother in a same-sex relationship.

Accordingly, the court found that the best interests of the child would be served by granting the petitioner's request for adoption of the child, thereby guaranteeing recognition of both the petitioner and her partner as his parents throughout the country, and according petitioner all the rights and responsibilities appurtenant to the relationship.

***Matter of Sebastian*, NYLJ, April 15, 2009, p. 27 (Sur. Ct. New York County)**